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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

WILLMUT GAS AND OIL COMPANY, *Petitioner*

v.

FEDERAL POWER COMMISSION,

UNITED GAS PIPE LINE COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Willmut Gas and Oil Company prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-styled cause on July 20, 1961.

OPINIONS BELOW

The Opinion of the Court of Appeals, not yet reported, is set forth in Appendix A hereto. The order of the Federal Power Commission (R. 52) affirmed by the Court of Appeals is also unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1961. The jurisdiction of the Court of Appeals was based on Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b). The jurisdiction of this Court is based on Section 1254(1) of the Judicial Code, 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

During the pendency of proceedings before the Federal Power Commission under Section 4(e) of the Natural Gas Act, 15 U.S.C. 717c(e), to determine the lawfulness of rate increases filed by a natural gas company under Section 4(d) of the Act, the company tendered superseding increases for filing under Section 4(d). Petitioner, a customer of the company, petitioned the Commission to reject the superseding increases, or, in the alternative, to issue an order accepting them for filing and disallowing the superseded increases by dismissing the proceedings thereon and ordering refund of monies collected under them. The Commission denied the petition by issuing an order accepting the superseding increases for filing, permitting some to take effect, suspending others and convening a proceeding on the lawfulness of all of them.

Two questions are presented:

1. Can the Federal Power Commission, whose authority under Section 4(e) of the Natural Gas Act is

confined to the issuance of orders fixing rates for sales of natural gas to be thereafter observed and which has instituted proceedings under Section 4(e) on particular rates filed by the natural gas company under Section 4(d), permit those rates to be superseded by higher rates filed under Section 4(d) while those proceedings are pending and before it has issued such orders?

2. If the Federal Power Commission permits rates to be filed and made effective under Sections 4(d) and 4(e) of the Natural Gas Act, which rates increase and supersede prior increased rates filed under Section 4(d) and under investigation in proceedings instituted under Section 4(e), has it deprived itself of jurisdiction to continue said investigation and issue orders determining the lawfulness of the rates at issue therein?

RELEVANT STATUTES AND RULES

The relevant sections of the Natural Gas Act and the Commission's Regulations thereunder are set forth in Appendix C hereto.

STATEMENT OF THE CASE

United Gas Pipe Line Company is a natural gas company as that term is defined in Section 2(6) of the Natural Gas Act. It is engaged in the sale of natural gas in interstate commerce for resale at rates filed with the Federal Power Commission pursuant to Section 4 of the Act, among which rates are those described in its tariffs as its IND-J, DG-J and G-J Rate Schedules, all applicable in its Jackson Rate Zone. Willmut Gas and Oil Company sells and distributes natural gas in Hattiesburg, Mississippi and its environs. It pur-

chases its entire supply of gas from United under its Rate Schedule IND-J (applicable to gas resold for large volume industrial use only), and its Rate Schedules DG-J and G-J (applicable to gas resold for general use, primarily by domestic and commercial consumers).

As of February 11, 1960, there were (and still are) pending and undecided before the Commission five separate proceedings convened under Section 4(e) of the Act to determine the lawfulness of five separate changes in United's IND-J, DG-J and G-J rates filed with the Commission under Section 4(d) of the Act. Each filing contains rates superseding and increasing the rates contained in the next preceding filing, and each of the last four filings was made while the proceedings to determine the lawfulness of the rates in the preceding filings were pending. These proceedings bear the Commission's Docket Nos. G-9547 (filing of September 30, 1955), G-10592 (filing of May 15, 1956), G-12801 (filing of May 29, 1957), G-15360 (filing of May 29, 1958) and G-18406 (filing of March 30, 1959).

On February 11, 1960 United tendered to the Commission for filing its sixth superseding increases in its Rate Schedules IND-J, DG-J and G-J, which it proposed to make effective on March 13, 1960. This filing is the subject of the Commission's Docket No. RP60-2. On February 23, 1960 Willmut filed a petition asking the Commission to reject said sixth increases, or alternatively, to issue an order accepting them for filing and disallowing the rate increases at issue in Docket Nos. G-9547, G-10592, G-12801, G-15360 and G-18406. On March 1, 1960 United filed an Answer to Willmut's Petition praying that it "be in all things denied". On

March 10, 1960, the Commission issued an order (1) reciting, *inter alia*, the filing of Willmut's Petition and United's Answer thereto and that the rates contained in said Schedules may be unlawful, (2) accepting said Schedules for filing, (3) permitting said IND-J Schedule to take effect on March 13, 1960, (4) suspending said DG-J and G-J Schedules until August 13, 1960, and (5) ordering a public hearing on said Schedules at a date to be subsequently fixed. The DG-J and G-J Schedules went into effect on August 13, 1960 pursuant to a motion filed by United under Section 4(e) of the Act.[1]

Willmut petitioned for and was denied rehearing of the Commission's order of March 10, 1960, after which it sought and obtained review of the Commission's action in the Court of Appeals for the District of Columbia Circuit. On July 20, 1961, that Court issued its opinion by Chief Judge Miller, Associate Judges Fahy and Burger concurring, affirming the order of the Commission.

REASONS WHY THE WRIT SHOULD ISSUE

The Conflict Between Circuits

This petition presents important questions of federal law which have not been decided by this Court. Until this Court does decide them the scope of the authority and correlative duty of the Federal Power Commission to control natural gas rates, which control and the consequent protection of consumers were the whole reason for the enactment of the Natural Gas

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[1] The sixth increases were themselves superseded by subsequent increases filed by United on January 18, 1961. The IND-J Schedules of these seventh increases went into effect on February 18, 1961. The DG-J and G-J rates went into effect on June 15, 1961.

Act, will remain confused and obscure. Indeed, the Commission's holding affirmed by the Court below in this case is in effect an abdication of its regulatory authority under the Act, the result of which is to permit Section 4 thereof to be used as a vehicle for piling increase upon increase with such frequency and regularity as to foreclose the Commission from discharging its duty to fix just, reasonable and otherwise lawful rates.

Moreover, unless this Court decides the questions presented now there will be left standing two conflicting decisions by two Courts of Appeals rendered within four days of one another. One is the decision which this petition asks this Court to review. The other is the decision of the United States Court of Appeals for the Tenth Circuit in *Amerada Petroleum Corp.* v. *F.P.C.* (Nos. 6483, 6498, decided July 24, 1961). The latter decision, not yet reported, is set forth in Appendix B hereto. A comparision of the two cases discloses a sharp conflict between the two Courts on two vital matters: First, the proper interpretation of this Court's holding in *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 76 S. Ct. 373, and *United Gas Pipe Line Co.* v. *Memphis L.G. & W. Div.*, 358 U.S. 103, 79 S. Ct. 194; second, the nature and reach of the Commission's authority under Section 16 of the Natural Gas Act.

In both the *Amerada* Case and the instant case the issue was the power of the Commission to reject for filing under Section 4(d) of the Natural Gas Act increases in gas rates superseding previously filed increases whose lawfulness was in issue in pending proceedings instituted under Section 4(e). The only relevant difference in the facts in the two cases is that

in *Amerada* the superseding increases were tendered for filing while the prior increases were under suspension, whereas in the instant case the superseding increases were filed after the period of suspension had expired. However, neither Court treated suspension *vel non* as material.

In *Amerada* the Court held that the Commission had authority to reject and that it properly rejected for filing increases which would have superseded prior increases under investigation. In so doing *Amerada* correctly read *Mobile*. As this Court explained in *Memphis, Mobile* does no more than tell us one circumstance in which a natural gas company may not file an increase in rates under Section 4(d) of the Act, i.e., when it has contracted away its right to do so. It does not tell us the circumstances in which a natural gas company who has not contracted away its right to file an increase in rates may do so. The Court below incorrectly read *Mobile* as holding that the Commission is without power to "restrict the right of a natural gas company to change the rates under which it offers to furnish service, subject only to the requirements of Section 4(d) of the Act that it notify the Commission of the changes. . . ." In so doing it ignored the very holding in *Memphis* on which *Amerada* relied, namely, that even though a natural gas company be contractually free to file increases, its right to do so is "subject of course to the procedures and limitations of the Natural Gas Act." 358 U.S. at page 110.

Both the Court in *Amerada,* and the Commission in its brief there relied on Section 16 of the Natural Gas Act, by which, to quote the Court:

> ". . . the Commission is expressly vested with power 'to perform any and all acts, and to pre-

> scribe, issue, make, amend, and rescind such orders . . . as it may find necessary or appropriate to carry out the provisions of this Act.' *Manifestly, that is a sweeping grant of administrative authority to be exercised in the sound discretion of the Commission. . . .*" (App. B, p. 14a; emphasis supplied)

The Commission's brief in *Amerada*, quoting *Atlantic Seaboard Corp.* v. *F.P.C.*, 201 F. 2d 568, 571, noted that its authority under Section 16 ". . . extends to regulation of the procedure 'under which increased rate schedules are to be filed'." (FPC Brief, p. 6). And it pointed out that Section 16 gave it "power to adopt reasonable procedures promulgated in the light of a statute which did not contemplate the type of successive increases exemplified in this case." (FPC Brief, p. 6).

In contrast the Court below held that "the broad power granted by [Section 16] does not authorize an order, rule or regulation" governing the circumstances under which rate increases may be filed under Section 4(d). It was of the view that "if 'piling increase upon increase' is to be forbidden, legislation to that effect must be adopted." (App. A, p. 9a).

The Nature of the Commission's Basic Authority

The Congress may delegate to administrative agencies either legislative or judicial authority or both. Thus the Interstate Commerce Commission exercises both in the regulation of the rates of railroads. *Arizona Grocery Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 350, 52 S. Ct. 183 (1932). That case emphasizes both the difference between the two types of authority, and the inadequacy of judicial authority to afford pro-

tection against exhorbitant rates. As this Court there said, if the Commission can exercise only judicial authority the carrier is free, notwithstanding a finding that a rate is unreasonable, to "put into effect a new and slightly different rate and compel the shipper to resort to a new proceeding to have this declared unreasonable". 52 S. Ct. at p. 184.

As a consequence the Congress vested in the Federal Power Commission legislative authority, i.e., the authority to prescribe rates for the future, and when it declares a specific rate to be the lawful rate "it speaks as the Legislature, and its pronouncement has the force of a statute". 52 S. Ct. at p. 184. This legislative authority is the only rate regulatory authority the Commission has. As Mr. Justice Frankfurter said in his dissenting opinion in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 263, "the statute is based on the assumption that unlawful rates will ordinarily be promptly corrected at the initiative of injured parties permitted to resort to the Commission for prospective relief". Hence the Federal Power Commission has no judicial power to award reparations. To quote *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 805 (C. A. 4th 1952):

> "The Commission is given no power to enter reparation orders with respect to rates. Its power over rates, which is prescribed by section 5(a), 15 U.S.C.A. § 717d(a), is to determine after a hearing whether existing rates are unjust, unreasonable, discriminatory or preferential, and, if so, to prescribe the just and reasonable rates 'to be thereafter observed and in force'. If it suspends a proposed new rate under section 4(e), and enters upon a hearing pursuant to that section, it can

> make only such orders with respect thereto 'as would be proper in a proceeding initiated after it had become effective', i.e. a proceeding under section 5(a). As said by the Supreme Court in Federal Power Comm. v. Hope Natural Gas Co., 320 U.S. 591, 618, 64 S. Ct. 281, 295, 88 L.Ed. 333. 'It is conceded that under the Act the Commission has no power to make reparation orders. And its power to fix rates admittedly is limited to those 'to be thereafter observed and in force.' "

Furthermore, the Commission may not even determine the lawfulness of rates applicable in a past period. "If it was not given the power to fix past rates, or award reparations based upon their unreasonableness, it certainly was given no power to do the same thing indirectly by making findings of fact as to past rates to be given effect in rate proceedings before state commissions." *Hope Natural Gas Co.* v. *Federal Power Commission*, 134 F. 2d 287, 310 (C. A. 4th 1943), rev'd. on other grounds, 320 U.S. 591, 64 S. Ct. 281 (1944). See also *Montana-Dakota Util. Co.* v. *Northwestern Pub. S. Co., supra.* There this Court held that the Commission could not make findings as to the reasonableness of rates under Section 206(a) of the Federal Power Act, saying that:

> ". . . we know of no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose. The fact that the Congress withheld from the Commission power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly. There is no indication in the Power Act that that was Congress' intent."

The *Montana-Dakota* Case and its specific holding were re-examined, approved and applied to limit the authority of the Interstate Commerce Commission over the rates of motor carriers to the exercise of legislative power to fix rates for the future in 1959. *T.I.M.E.* v. *U.S.A.*, 359 U.S. 464, 79 S. Ct. 904. The provisions of the Federal Power Act relevant to the Commission's rate regulatory authority "are in all material respects substantially identical to the equivalent provisions of the Natural Gas Act." *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353, 76 S. Ct. 368, 371 (1956).

Whether the Commission proceeds to discharge its rate regulatory function under Section 4(e) or under Section 5(a) of the Act, it is exercising the same authority, namely the authority to determine whether existing rates are lawful, and, if not, to prescribe others for the future. *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 341, 76 S. Ct. 373, 379. As the Court there held:

> "The powers of the Commission are defined by §§ 4(e) and 5(a). The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential'. This is neither a 'rate-making' nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them. Section 5(a) would of its own force apply to *all* the rates of a natural gas company, whether long-established or newly changed, but in the latter case the power is further implemented by § 4(e). All that § 4(e) does, however, is to add to this basic power, in the case of a

> newly changed rate or contract (except 'industrial' rates), the further powers (1) to preserve the status quo pending review of the new rate by suspending its operation for a limited period, and (2) thereafter to make its order retroactive, by means of the refund procedure, to the date the change became effective. The scope and purpose of the Commission's review remain the same—to determine whether the rate fixed by the natural gas company is lawful." (Emphasis the Court's).

And the existence of the suspension power "in no way affects the character of the proceeding [under Section 4(e)], which remains, like a § 5(a) proceeding, simply a review by the Commission of a rate established by the natural gas company." *Mobile* so held. 350 U.S. at p. 343, 76 S. Ct. at p. 380. Indeed this is plain from Section 4(e) itself, which gives the Commission authority to enter upon a hearing concerning the lawfulness of newly-filed rates even though it cannot suspend industrial rates and may not choose to suspend other rates.

The Need to Preserve the Commission's Basic Authority

The foregoing demonstrates beyond doubt that when rates have ceased to be existing rates, when they have become past rates, the Commission has no authority to determine their lawfulness, either in a proceeding under Section 5(a) or in a proceeding under Section 4(e). It follows that only by the Commission's exercise of its authority to review existing rates and fix lawful rates for the future can obedience to the commands of Section 4(a) and (b) that all rates be just, reasonable and non-discriminatory, be compelled. Hence the preservation and protection of the Commission's ability to exercise this authority is indispensable. The ques-

tion here is whether the Commission may, by action or inaction, effectively foreclose itself from exercising that authority. That it has done just this here is patent.

On November 2, 1954 the Commission, in consolidated proceedings under Sections 4(e) and 5(a) of the Act on all of the rates of United, issued an order prescribing rates to be charged Willmut and virtually all of its other customers to whom it sells gas for re-sale "on and after August 1, 1954". Notwithstanding the Order of November 2, 1954 United effected periodic increases, each one superseding the one before, in virtually all of those rates, including those charged Willmut, by filings under Section 4(d) of the Act in September of 1955, May of 1956, May of 1957, May of 1958, March of 1959, February of 1960, and January of 1961. As each filing was made the Commission issued an order reciting the reasons stated by United in support of the increases, finding that the rates "may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful," and providing for a hearing pursuant to Section 4(e), and in some cases pursuant to Section 5(a) as well. For example the order instituting an investigation in Docket G-9547, invokes both Section 4(e) and Section 5(a). Hearings on the increases filed in September of 1955 and May of 1956 were concluded on October 31, 1956 and April 8, 1957, respectively, but no determination of the lawfulness of the rates in issue in those cases has yet been made. Hearings on the other increases have just begun. The result is that for the past six full years Willmut and virtually all of United's other resale customers have been paying rates which are not only higher than those the Commission found lawful

in November of 1954 and directed to be "thereafter observed and in force," but also which the Commission found may be unlawful.

All of United's rates in issue except those made effective by the filing of January 18, 1961 are past rates. Hence, with this matter in its present posture the Commission cannot exercise the only authority respecting them it had, i.e., to review them while they were existing and, if it determined them to be unlawful, to prescribe others for the future in their stead. The result is that unless the Commission is required to take appropriate action there is no way to determine whether United obeyed the commands of Section 4(a) and 4(b) of the Act that it charge just, reasonable and nondiscriminatory rates during the period from September of 1955 to January 1961, much less to compel obedience to, or grant Willmut and its other customers a remedy for its disobedience of, those commands.

The Commission's Power to Preserve Its Basic Authority

The Commission with the approval of the Court below, says that it is helpless in the premises. We submit that it is not. As we've seen, this conclusion is founded on the view that *Mobile* and *Memphis* interpret Section 4(d) of the Act to give a natural gas company an absolute right to file changes in rates unless it has contracted with its customers not to. This is untenable. Section 4(d) in relevant part reads as follows:

> "Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be

> given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. . . ."

The foregoing language governs only *how* rate changes may be made. It does not govern whether or when they may be made, or even what kind of changes may be made. Indeed, this is the import of *Mobile* and *Memphis*. As this Court said in Memphis, "Mobile makes it plain that '§ 4(d) on its face indicates no more than that *otherwise valid* changes cannot be put into effect without giving the required notice to the Commission.' " 358 U.S. at p. 112, 79 S. Ct. at p. 199. (Emphasis the Court's in *Memphis*).

The validity of the changes in both *Mobile* and *Memphis* turned on the nature of the relationship and the terms and conditions of United's contracts with its customers. In *Mobile* the Court held that a natural gas company's rate changing powers *vis a vis its customers* were unaffected by the Act and that United had contracted away its right to effect a change in its rate to Mobile. In *Memphis* it held that United had not contracted away its right to effect a change in its rate, and that on the record before it in that case United had complied with "the duties which these sections [4(c) and 4(d)] in terms impose upon it." 358 U.S. at p. 111, 79 S. Ct. at p. 199. In neither case did the Court hold that compliance with a contract and with the terms of Section 4(d) were the *sole criteria* for determining the validity of a rate change. On the contrary, the Court said in *Memphis* that United was contractually "free to change its rates from time to time, *subject, of course, to the procedures and limitations of the Natural Gas*

Act." 358 U.S. at p. 110, 79 S. Ct. at p. 198. (Emphasis supplied.)

Both the Commission and the Courts have made clear that compliance with Section 4(d) alone does not make a rate change valid. Under Section 16 of the Act the Commission has broad authority to "perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules and regulations as it may find necessary or *appropriate to carry out* the provisions of this act. . . ." (Emphasis supplied.) Under this Section the Commission has promulgated its Regulations Under the Natural Gas Act. Among other things Section 154.22 forbids the filing of a rate change more than 60 days before it is to take effect. Section 154.38(d)(1) requires rates in contracts to be stated in dollars and cents per unit. Section 154.38(d)(3) forbids contracts to provide for rate adjustments. Section 154.40 requires contracts to spell out the rights and obligations of the parties with respect to specific matters. Section 154.63 requires the filing of elaborate and specifically described materials with and in addition to filings of rate changes. Section 154.24 gives the Commission the right to reject any filing which does not comply with the foregoing rules. Section 154.66(a) forbids the withdrawal of a suspended rate change without special permission upon application and for good cause shown. Sections 154.66(b) and (c) likewise forbid changes in suspended rates changes, and changes in existing rates during the period of suspension of changes therein.[2]

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[2] Section 154.66 was promulgated by Order No. 159 issued March 6, 1951. In that Order the Commission said:

"As for the objections which argue lack of authority in the Commission and the right of natural gas companies to file changes without restriction during the period of suspension, it seems

An order of the Commission summarily disallowing a rate change filed 75 days after its decision on a prior change was held proper. *Panhandle Eastern Pipe L. Co.* v. *Federal Power Com'n.*, 236 F. 2d 606 (C. A. 3rd 1956). So too was an order disallowing a rate increase insofar as it was based on the same matters which the Commission had held insufficient in a proceeding on another rate increase by the same natural gas company. *State Corp. Com'n. of Kan.* v. *Federal Power Com'n.*, 206 F. 2d 690 (C. A. 8th 1953). And *Mobile* holds that there "can be no doubt of the authority of the Commission to reject [an] unauthorized filing under its general powers to issue orders 'necessary or appropriate to carry out the provisions of this Act', § 16", and that its failure to do so is reversible error. 350 U.S. at p. 347, 76 S. Ct. at p. 382.

Further strong support for the Commission's power to control rate filings under Section 4(d) of the Act is found in the Interstate Commerce Act and decisions thereunder. "Section 5 of the [Natural Gas] Act was modeled on the provisions of the Transportation Act, 49 U.S.C. §§ 13, 15. . . ." *Federal Power Commission*

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sufficient to point out that the provisions of the new § 154.66 effectuate the primary purpose for suspension of changes in rate schedules or tariffs, namely, the maintenance of the *status quo until due inquiry has disclosed the propriety or lack thereof, of the proposed change.* Unrestrained filing of changes upon changes would preclude orderly determination of issues and would be productive of uncertainty regarding the effective rates and charges, nullifying the definiteness and certainty which filing requirements are intended to afford consumers and other interested parties. The exercise of the authority contemplated by the new § 154.66 is a necessary incident to the authority vested in the Commission by § 4 of the Natural Gas Act, and additionally finds ample support in § 16, which provides that the 'Commission shall have power • • • to prescribe • • • such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of the Act.'" (Emphasis supplied).

v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 584, 62 S. Ct. 736, 742. Indeed, except for the former's preservation of the right of natural gas companies to contract with their customers, the scheme for the exercise of legislative authority to review existing rates and fix future rates, the only power the Federal Power Commission has, is the same. See *Hope, supra,* 196 F. 2d at p. 806-807. Thus Section 15(1) of the Interstate Commerce Act, like Section 5(a) of the Natural Gas Act gives the Commission authority to review existing rates, and if it finds them unlawful "to determine and prescribe what will be the just and reasonable . . . rates . . . to be thereafter observed. . . ." Section 6(1), like Section 4(c) requires all rates to be filed with the Commission and kept open for public inspection. Section 6(3), like Section 4(d), provides that: "No change shall be made [in rates] except after thirty days' notice to the Commission and the public." Section 15(7) provides for the suspension for a limited time and investigation of rates filed pursuant to Section 6(3) just as Section 4(e) provides for the suspension for a limited time and investigation of rates filed pursuant to Section 4(d).

> "The settled construction by the Interstate Commerce Commission of the suspension provision of the Interstate Commerce Act is that, when the Commission suspends a rate, the old rate is continued in effect *pending the investigation* and subsequent orders allowing increased rates are given only prospective operation." *Hope, supra,* 196 F. 2d at p. 807. (Emphasis supplied.)

> "When the [Interstate Commerce] Commission suspends the operation of a tariff it is contemplated that the rates sought to be increased or otherwise changed are to be continued in effect pending the investigation. *In other words it is*

> *expected that the status quo will be maintained until the proposed change therein can be fully investigated. . . .*" *Class Rates Between Stations In Louisiana*, 33 I.C.C. 302, 303 (1915). (Emphasis supplied).
>
> "The rule applies, therefore, that where provisions of one statute have been adopted by another, the interpretation which has been authoritatively placed upon the former applies to the latter also." *Hope, supra*, 196 F. 2d at p. 807.

That the Commission has the same authority as the Interstate Commerce Commission to prevent increased rate filings before the lawfulness of prior filings is determined is further evidenced by the dissent of Mr. Justice Douglas in *Memphis*, in which the Chief Justice and Mr. Justice Black concurred. In support of their view that the "construction adopted by the court [in *Memphis*] has dire consequences" they said: "Even when the Commission catches up with the new high rate fixed by the selling company at its will and strikes it down, its action promises to have only a fleeting effect. The pipeline company can now in its unfettered discretion raise the rates again simply by filing a new rate; and if it is an industrial rate it cannot even be suspended." In a footnote to this the State of Washington is quoted to the effect that "any relief obtained by a Commission order after review could be effectively nullified 30 days after it was obtained." How much more dire the consequences if, as the Court below holds, the Commission can allow a natural gas company to file a second, third, fourth, fifth, sixth and seventh increase before a determination of the lawfulness of the first is made?

In this connection it is of course true that, as the majority in *Memphis* said, business reality requires that

natural gas companies have adequate revenues. But the majority obviously did not mean that this requires that they be allowed to file rate increases at will, each to take effect not more than 30 days after filing in the case of industrial rates and not more than 6 months after filing in the case of other rates. As the late Mr. Justice Parker said in *Hope, supra,* 196 F. 2d at p. 809:

> "Rate making is not an exact science and losses of one period must be counterbalanced against gains of another in any fair consideration of the reasonableness of the rate making procedure.
>
> "[5] It is true, of course, that a utility is entitled to rates that are just and reasonable; but this is not to say that rates must fluctuate automatically with every change in economic conditions or that a reasonable time may not be allowed for determining the reasonableness of a proposed increase in rates before it is allowed to go into effect. Any loss sustained by a maintenance of the status quo while such determination is being made is properly considered, not as a violation of constitutional right, but as a necessary incident of rate regulation so long as the period of suspension does not 'overpass the bounds of reason.' . . ."

As Mr. Justice Harlan said on this matter of economics in *Memphis,* the Congress provided in Section 4 of the Natural Gas Act "for the earliest effectuation of contractually authorized or otherwise permissible rate changes *consistent with appropriate Commission review.*" 358 U.S. at p. 114, 79 S. Ct. at p. 200. (Emphasis supplied.)

It cannot be gainsaid that to permit the filing under Section 4(d) of a rate increase which supersedes one previously filed but under investigation as to its lawfulness is not "consistent with appropriate Commis-

sion review" when, as we have seen, to do so is to render the superseded rates past rates and deprive the Commission of any power whatever to review them. Assuming *arguendo* this were not true, to permit the superseding increase to take effect is to nullify in advance the order to be issued in the proceeding on the superseded rates, because that order cannot be effective as fixing rates "thereafter to be observed and in force". Thus even if that order should condemn the superseded rates the natural gas company will go on collecting rates, not merely as high as, but higher than the condemned rates. The Commission has put United's right to an increase under the criteria of Section 5(a) into issue by convening hearings under Section 4(e) on the first increase filed under Section 4(d). It cannot permit United to keep that issue pending by periodic superseding filings, the effect of which is to give it a permanent hedge against failing to prove its right to an increase, and to force its customers and the ultimate consumers to buy gas at rates the lawfulness of which has not and cannot be determined.

What the Commission Can Do

The Court below was of the view that the Commission had jurisdiction to determine the lawfulness of superseded and thus past rates because otherwise

> "a natural gas company whose newly-increased rates were being investigated by the Commission could render them immune from further scrutiny by the simple expedient of filing another increase. . . ." (App. A p. 6a).

This of course begs the question. Whether the "simple expedient" is available to a natural gas com-

pany is the basic issue. We submit that it is not because the Commission has ample authority to reject "another increase." This is just the authority it finally exercised in the *Amerada* Case.

Alternatively, the Commission can accept the superseding increases and dismiss the proceedings on the earlier ones with directions to refund amounts collected thereunder. The Court of Appeals described this alternative as "an incongruous procedure" because the Commission would necessarily be exercising jurisdiction over past rates by disallowing them and ordering refunds. (App. A, p. 6a). We submit that there is no incongruity. Indeed the Commission first chose this alternative in the *Amerada* Case when it ordered the proceedings on the superseded filings dismissed in lieu of rejecting the superseding filings. (App. B, p. 12a). The limitation on the Commission's basic rate regulatory power in Section 5(a) forbids it to determine or fix rates for the past. It does not forbid it to terminate and dispose of proceedings on rates whose lawfulness it has lost jurisdiction to determine.

Nor does Section 4(e) make a finding of unlawfulness a condition precedent to an order requiring refund. Thus in *Episcopal Theological Seminary* v. *F.P.C.*, 269 F. 2d 228, the Commission terminated a proceeding under Section 4(e) by disallowing a rate increase for failure of its proponent to carry its burden of proof that it was lawful. Although it made no finding that any rate was lawful there, it ordered the refund of the amounts collected under the disallowed increase. It had statutory authority to do the same thing here, and all of its orders permitting the rates in issue here to take effect specifically provide, as the order of June 20, 1958 in Docket No. G-12801

puts it, that the collection of the increases is "subject to further order or orders of the Commission in this proceeding, upon acceptance by the Commission . . . of [a] corporate bond, agreement, or other assurance of refund . . .".

Unless the Commission were to adopt the first alternative, i.e., reject United's superseding increases, United would be in the same position with respect to the superseded increases as were the producers in the *Episcopal* Case. It, as were they, would be unable to carry the burden of proof that the rates are lawful. They could not carry their burden because they failed to introduce sufficient evidence. United could not carry its burden because, by its subsequent filing, it deprived the Commission of jurisdiction to determine whether its evidence is sufficient or not. Therefore, as in *Episcopal,* the only appropriate order would be one dismissing the proceedings and ordering refund.

CONCLUSION

For the reasons set forth in this Petition, Willmut Gas and Oil Company prays that a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit and that upon review of the record in that Court its judgment be reversed and the cause remanded to it with directions to remand it to the Federal Power Commission with directions to either reject the tendered rate increases for filing, or, in the alternative, to accept the tendered rate increases for filing, permit them to become effective, dismiss the pend-

ing proceedings on the rates said increases superseded, and direct refund of amounts collected thereunder.

Respectfully submitted,

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